INDEX

CITATIONS

Cases:

Cases—Continued.

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 25

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. B-825, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 65–130) are reported in 4 N. L. R. B. 71. The opinion of the Circuit Court of Appeals (R. 1737–47) is reported in 95 F. (2d) 390.

JURISDICTION

The decree of the court below (R. 1748) was entered on March 21, 1938. The petition for a writ

of certiorari was filed on April 12, 1938, and was granted on May 16, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10, paragraphs (e) and (f), of the National Labor Relations Act.

QUESTIONS PRESENTED

In large part, the questions presented by the instant case are identical with those raised in No. 19, *Consolidated Edison Company of New York, Inc., et al.* v. *National Labor Relations Board,* which was consolidated with the present case in the court below, and which is brought here for review of the same decision and order. See Brief for National Labor Relations Board, pp. 2–3. The additional question presented by the petition herein is:

Whether petitioners, although they were given actual notice and had actual knowledge of the proceeding instituted by the Board against petitioners in No. 19 (hereinafter referred to as Consolidated Edison Company), were deprived of due process of law in that the Board did not join them as parties to such proceeding.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151, *et seq.*) are set forth in the Appendix, pp. 17–19.

STATEMENT

The decision of the Board, issued November 10, 1937, setting forth its findings of fact, conclusions of law, and order (R. 65–130), and the proceedings pursuant to which the decision was rendered, are all detailed at length in the brief for the Board in No. 19, *Consolidated Edison Company, Inc., et al.* v. *National Labor Relations Board,* pp. 3–13, to which the Court is respectfully referred.

The separate question presented by the present case requires only a short additional statement. A copy of the complaint and notice of hearing was delivered by Western Union Telegraph Messenger Errand Service addressed to petitioner International Brotherhood of Electrical Workers at the office of its Local No. 3, at 130 East 25th Street, New York City, on May 12, 1937.[1] Receipt of the complaint and notice of hearing was acknowledged on the delivery ticket as follows: "Loc 3 IBEW D Kaplan" on that date (R. 16–18). On May 25, 1937, prior to the hearing, a copy of the amended notice of hearing was served upon the Brotherhood by registered mail, return receipt requested, at 130 East 25th Street, New York City (R. 35–36).

The answer of the Board to the petition for review in the present case stated (R. 1711) that petitioners had actual notice of the proceedings and

[1] The delivery ticket (R. 18) was incorrectly addressed to *103* East 25th Street, but delivery was acknowledged at the correct address, *130* East 25th Street.

that their counsel or other representatives attended the hearings. This was not denied in the reply (R. 1734).[2]

Petitioners herein at no time participated in the proceedings before the Board, nor did they make application to intervene in those proceedings as they were entitled to do under Section 10 (b) of the Act. After the Board's order was issued, petitioners filed with the court below, on November 22, 1937, their petition to set aside the order pursuant to Section 10 (f) of the Act (R. 1554–1691). The Board answered on December 6, 1937, requesting enforcement of its order (R. 1711–1725). Petitioners replied on January 13, 1938 (R. 1734). The petition was consolidated with that in No. 19 (R. 1736–1737) and was denied by the court below (R. 1748). A writ of certiorari was granted on May 16, 1938 (R. 1748).

SUMMARY OF ARGUMENT

Petitioners' claim is that under ordinary equity practice they were indispensable parties to the proceedings before the Board's Trial Examiner and that their non-joinder constitutes a violation of due

[2] The reply filed by petitioners herein (R. 1734) adopted the reply filed by petitioners in No. 19 (R. 1726–1733). That reply did not deny actual notice to petitioners herein, since the Board did not make an allegation as to notice to the Brotherhood in its answer to the petition for review filed by the Consolidated Edison Company. Consequently, the allegation in the answer of the Board to the petition herein stands undenied.

process regardless of the facts that actual notice was given them, which they do not deny, and that no prejudice is asserted to have resulted from the claimed error of law. (1) The argument is based upon a false premise, since under ordinary equity practice petitioners were not indispensable parties and, even if they were, the defect was entirely cured by their full participation in the proceedings for review of the Board's order, and would not warrant reversal of a decree in equity. (2) Even were the premise true, the conclusion drawn by petitioners from it would not follow, since the Act forbade joinder of petitioners as parties defendant to the complaint and, in so doing, violated no requirement of due process. The order did not run against petitioners. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. Further, petitioners were fully protected under the Act from injury to their interests by the opportunities to intervene in the proceedings before the Trial Examiner (Section 10 (b)) and to apply to the court below to set aside the Board's order (Section 10 (e) and (f)). Petitioners exercised the latter opportunity to the fullest extent and cannot now assert the prejudice which is essential to a claim that constitutional right has been infringed.

ARGUMENT

In large part, the questions raised by the instant case are identical with those raised in *Consolidated*

Edison Company, Inc. et al. v. *National Labor Relations Board,* No. 19, which is consolidated herewith. To the extent that petitioners herein are entitled to be heard upon these questions, we respectfully refer the Court to the brief for the Board therein. In the present brief we shall discuss only the additional question presented by the claim of these petitioners that they should have been made parties to the proceeding before the Board's Trial Examiner against Consolidated Edison Company, Inc., and the other petitioners in No. 19 (hereinafter referred to as Consolidated Edison Company).

A brief survey of the facts considerably narrows the question at issue. Petitioners cannot, and do not, contend that they were deprived of rights without actual notice and knowledge of the proceedings instituted by the Board. On May 12, 1937, a copy of the complaint and notice of hearing, addressed to petitioner International Brotherhood of Electrical Workers was delivered by a Western Union messenger at the office of its Local Union No. 3 at 130 East 25th Street, New York City, and receipt was acknowledged (R. 16–18). Although great stress is laid upon the fact that Local No. 3 was not a party to those proceedings (Br. pp. 8, 32–36), it is nowhere denied that the complaint and notice of hearing so served actually reached petitioners. Again, on May 25, 1937, prior to the hearing, a copy of the amended notice of hearing was served upon the Brotherhood by registered mail,

return receipt requested, at 130 East 25th Street, New York City (R. 34–36), and again, although petitioners emphasize the absence from the record of the return receipt (Br. p. 32), there is no statement that the notice was not actually received by petitioners. The allegation in the answer filed by the Board to the petition for review in this case that petitioners had notice of the proceedings and that their counsel attended the hearings (R. 1715), was not denied in the reply filed by petitioners.[3] The similar statement in the brief filed by the Board in opposition to the petition for certiorari was not denied in the brief filed for petitioners.[4]

Nor do petitioners assert that any actual prejudice resulted from the fact that they were not joined as parties. Having had actual knowledge of the proceedings, petitioners could have availed themselves of the opportunity provided by Section 10 (b) of the Act, *infra*, pp. 17–18, to intervene and participate. They chose not to do so. They did, however, file their petition in the court below pursuant to Section 10 (f), *infra*, pp. 18–19, and participated as parties in the proceeding by which the order of the Board was sought to be set aside. Petitioners could have applied to the court below for

[3] See footnote 2, *supra*, p. 4.

[4] In view of the above facts, the statement by petitioners on page 7 of their brief that "No legal notice, either actual or constructive, was at any time given," we assume is properly to be interpreted as referring to their contention with respect to "legal" notice, and not as a denial of actual notice.

leave to adduce additional evidence (Section 10 (e) and (f)) and thus remedied their failure to appear in the hearings before the Board's Trial Examiner. By failing so to apply, petitioners evinced their approval of the record, and cannot here claim lack of opportunity to supplement it.

Petitioners' challenge of paragraphs 1 (f) and (g) of the Board's order, by which Consolidated Edison Company is required to cease and desist from giving effect to its contracts with petitioners, and from recognizing them as the exclusive representatives of its employees,[8] is, in other words, a strictly formal one, based neither upon lack of actual notice nor upon actual prejudice. It is, in brief, that since petitioners would be indispensable parties to a suit in equity to enjoin Consolidated Edison Company from giving effect to its contracts with petitioners, their non-joinder in the proceedings before the Trial Examiner constitutes a violation of due process, irrespective of actual notice or prejudice. The answer to this argument is that (1) the premise is false and, (2) even were the premise true, the conclusion does not follow from it.

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[8] Petitioners do not urge that any other parts of the order would be affected if their contention were sustained, and it is clear that only so much of it as affects petitioners would fail. *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 49; *Horn* v. *Lockhart*, 17 Wall. 570, 579; *Shields* v. *Barrow*, 17 How. 129, 139.

I

PETITIONERS NON-JOINDER WOULD NOT REQUIRE REVERSAL OF A DECREE UNDER EQUITY PRACTICE

No deprivation of due process can be predicated upon asserted departure from the rule governing indispensable parties in equity suits, for under that rule petitioners were not indispensable parties to the proceeding before the Board's Trial Examiner. Petitioners rely upon the rule that a court of equity will not enter a decree adversely affecting the interests of one who has not been joined as a party, but they patently misconceive its scope. There can be no claim here that either the Board or the court below has ordered petitioners to do or refrain from doing any act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271.

In fact, the basis of petitioners' complaint is solely their alleged loss of their contract rights under paragraphs 1 (f) and (g) of the order of the Board. Clearly, however, their contractual relationship with the Consolidated Edison Company does not make petitioners indispensable parties. Courts of equity are free to enjoin the performance of illegal acts by a party although he is under obligation to perform such acts by reason of contracts with persons not parties to the action. *Meyer* v. *Washington Times Co.*, 76 F. (2d) 988

(App. D. C.), certiorari denied, 295 U. S. 734; *New York Phonograph Co.* v. *Jones*, 123 Fed. 197 (S. D. N. Y.); *E. L. Husting Co.* v. *Coca-Cola Co.*, 194 Wis. 311, 205 Wis. 356, 375, certiorari denied, 285 U. S. 538; *Nokol Co.* v. *Becker*, 318 Mo. 292; *Alcazar Amusement Co.* v. *Mudd & Colley Amusement Co.*, 204 Ala. 509. And it is by no means rare that a court has occasion to declare a contract invalid, or to prohibit the making of other contracts, in suits to which only one of the contracting persons is a party. See, *e. g.*, *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2d).

The decision in *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, 285–286, is directly in point. The Court there held that a party to an agreement to consolidate was not an indispensable party to a suit to enjoin the defendant from fulfilling its agreement by entering or consummating the proposed consolidation. Petitioners' reference to the case (Br. p. 24) is directed at a different portion of the opinion dealing with an attempt to enjoin the New York Central Company, rather than the Lake Shore, from voting certain stock, and does not in any way impair its authority on the issue here involved.

In any event, even if the Board's failure to join petitioners as parties were a departure from usual equity practice, the defect would not warrant reversal in the circumstances of the present case.

The defect has been fully cured by petitioners' full participation in the proceedings for review of the Board's order initiated in the court below upon their own petition. The sole purpose of the equity rule as to indispensable parties is to preclude the entry of decrees affecting absent persons under circumstances which foreclose their assertion and protection of their rights. *Roos* v. *Texas Co.*, 23 F. (2d) 171, 172 (C. C. A. 2d). The purpose and end of the rule is, therefore, fully satisfied if an appeal is taken by indispensable parties who were not joined in the court of first instance and if, on such appeal, opportunity to present objections to the validity of the decree is afforded. In such circumstances any defect of parties is cured, and does not warrant reversal. *New Orleans Debenture Co.* v. *Louisiana*, 180 U. S. 320, 330, 332.

II

NEITHER THE ACT, NOR ANY PROVISION OF THE CONSTITUTION, REQUIRES THAT PETITIONERS BE MADE PARTIES TO THE PROCEEDING BEFORE THE BOARD

The conclusive answer to petitioners' contention, however, is that even if they were indispensable parties under equity practice, their joinder was not necessary under the Act or the Constitution, upon violation of which their claim is entirely based. By section 10 (b) of the Act, *infra*, p. 17–18, the Board is authorized to serve a complaint only upon persons charged with engaging in unfair

labor practices. Only employers can be charged with such practices (Section 8, *infra*, p. 17), and a labor organization is expressly declared not to be an employer (Section 2 (2), *infra*, p. 17). The Act, therefore, made it impossible for the Board to join petitioners as parties respondent in the complaint which it issued against the Consolidated Edison Company. The status of intervenors could be acquired, of course, only on petitioners' motion. Section 10 (b). Although petitioners had actual notice of the proceeding, no such motion was ever made.

The circumstance that, under the Act, the Board can proceed and issue orders only against an employer does not imply that the interests of labor organizations or other persons who do not intervene may not be adversely affected by the order. The orders authorized by the Act may injuriously affect a company-dominated labor organization which the employer is required to disestablish, a minority union with whose rival the employer is directed to bargain as exclusive representative of the employees, employees whose discharge may be required to make way for other employees, or other persons in a variety of not unusual situations. The prohibition against joining such persons as parties to the complaint demonstrates an intent by Congress that they should become parties only by intervention and that the power of the Board to require appropriate action by the employer should not be dependent upon their presence.

This limitation of the parties indispensable in a proceeding before the Trial Examiner to two—the Board and the employer—is unquestionably valid. In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, it was urged, as it is here, that the labor organization from which the employer was ordered to withdraw recognition was entitled to be notified formally and made a party to the proceedings. The contention was conclusively disposed of (303 U. S. at p. 271):

> As the order did not run against the Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them.

Petitioners advance several grounds upon which to distinguish the *Greyhound* case (Br. pp. 22–24), none of which, we submit, is substantial. The first distinction, that the Association in the *Greyhound* case was a company-dominated union, whereas petitioners here are not, ignores the fact that the decision of this Court was not rested upon the character of the Association, but upon the fact that the order did not run against it, which is equally true here. Petitioners argue that the Board contended in the *Greyhound* case that notice to the employer was notice to the Association. The argument, it is true, was one of several advanced by the Board, but since it was not accepted by the court or made the

basis of the decision, the fact that it cannot be made here is wholly irrelevant.

Another ground of distinction which petitioners suggest (Br. p. 23) seems to add to the authority of the *Greyhound* case here, rather than the contrary. Petitioners assert that the case is distinguishable because there the Association did not file a petition for review in the Circuit Court of Appeals under Section 10 (f). That fact, however, makes the present case a stronger one. In the *Greyhound* case the Board could only refer to the opportunity for review of the order by the Association; here petitioners have actually exercised their right of contesting the order in the Circuit Court of Appeals.

Moreover, wholly apart from the *Greyhound* case, there is clearly no constitutional necessity that petitioners be joined as parties. The rule as to parties is, of course, a rule of judicial administration (*Elmendorf* v. *Taylor,* 10 Wheat. 152, 166–167) and not of due process (*McCaughey* v. *Lyall,* 224 U. S. 558). But even if the right to become a party to a proceeding in which one's rights are incidentally affected be deemed a constitutional right, no particular form of proceeding safeguarding that right would be constitutionally required. Here petitioners were in fact informed of the proceedings before the Board and could have sought leave to intervene therein had they chosen to do so. Section 10 (b). Petitioners are now in no position

to complain that the statute failed to protect them adequately, even though the intervention was within the discretion of the Board, when they failed even to attempt to secure relief which would have protected them had it been granted. Cf. *United States* v. *Merchants & Manufacturers Traffic Ass'n,* 242 U. S. 178, 188. Moreover, petitioners could, and did, apply to the court below to have the order set aside. This, too, would protect them, for due process does not require a hearing prior to judgment, even of a party bound thereby, if defenses may be presented on appeal. *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 384. Finally, if petitioners believed that they had been prejudiced by their failure to participate in the taking of testimony, they could have applied to the court below for leave to adduce additional evidence before the Board. Section 10 (e) and (f).

We submit, therefore, that petitioners, while denied the status of indispensable parties by the Act itself, were afforded ample opportunities to protect their interest. "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 351. Petitioners availed themselves of their opportunity to petition for review, and cannot and do not claim prejudice arising from their nonjoinder as parties in the proceeding before the

Board. Clearly, no constitutional right has been infringed. Petitioners were no more deprived of due process than were the absent unions ordered to be disestablished in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, and *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272. See also *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; and *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 548.

CONCLUSION

We respectfully submit that the decision of the court below should be affirmed.

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APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

SEC. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof,

or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings

and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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